National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 10, 1997

TO: James J. McDermott, Regional Director, Region 31

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: National Association of Government Employees (American Medical Response) Case 31-CB-9885

536-2507

This Bill Johnson's[(1)] case was submitted for advice as to whether a Section 8(b)(1)(A) complaint was warranted attacking an arguably meritorious lawsuit that one union filed against agents of another union, where the unfair labor practice charge alleges that the lawsuit interferes with the rights of represented employees.

FACTS

The National Association of Government Employees (NAGE), an affiliate of the SEIU, is a Section 2(5) labor organization. It includes a division known as the International Association of EMTs & Paramedics (IAEP). In mid 1994, NAGE/IAEP conducted an organizing campaign among the Colorado employees of American Medical Response (AMR or the Employer); NAGE lost an election conducted by Region 27.

Approximately one year later, in mid 1995, NAGE representatives (and Charging Parties herein) Michael Rupert and Vincent Pernisco resumed organizing efforts among AMR employees in Colorado and obtained approximately 50 signed authorization cards. At that time, Rupert was the Regional Director for the Western Region of NAGE.

On January 12, 1996,[(2)] Rupert resigned his position with NAGE and was almost immediately replaced by Paul Jennings. Shortly thereafter, Rupert was hired by the International Brotherhood of Boilermakers (the Boilermakers) in their new division, the Professional EMTs & Paramedics (PEP). At the same time, Rupert returned to the AMR employees in Colorado and obtained new authorization cards on behalf of PEP.

On January 23, Jennings visited PEP's office to speak with Rupert and asked him to return any NAGE authorization cards he had. Rupert assertedly agreed to do so. During this conversation, Jennings saw Pernisco in PEP's office even though Pernisco was still a business agent/organizer for NAGE. Upon his return to his office, Jennings then determined that the AMR authorization cards were not in the NAGE files. Pernisco returned to the NAGE office later the same day and resigned his employment. Jennings asked Pernisco to return any AMR authorization cards he had.

Neither Rupert nor Pernisco ever returned any executed AMR authorization cards to NAGE.[(3)] On February 7, PEP filed an RC petition in Case 27-RC-7646 for a unit of AMR employees. NAGE intervened in the election proceedings, and its parent, the SEIU, filed an Article XXI[(4)] charge against the Boilermakers with the AFL-CIO. On April 12, an Impartial Umpire issued his decision in the Article XXI proceedings, finding that both unions were free to try to organize the AMR employees and that NAGE was not entitled to any preference in organizing.

NAGE has since adduced evidence that on February 15, shortly after resigning from NAGE and going to work for PEP, Michael Rupert sent letters to current NAGE members, soliciting them to join PEP. NAGE contends that this conduct violated the employment agreement Rupert had signed when he began work for NAGE and which barred him from "contacting, soliciting or representing any members, locals or officers [of NAGE]."

On March 18, NAGE filed a lawsuit in the Superior Court of the State of California for the County of Ventura; NAGE

amended the complaint on March 28. The amended complaint sought damages, a TRO and an injunction against Michael Rupert, Clarence Rupert and Vincent Pernisco[(5)] as individuals and 1 to 100 unnamed "Does." The Boilermakers were not named as a defendant. The lawsuit contained the following seven causes of action:

1. misappropriation of trade secrets

2. conversion

3. intentional interference with economic relationships - contract

4. intentional interference with prospective economic advantage

5. breach of contract

6. unfair competition/false and misleading advertising

7. defamation

These seven causes of action are divided into two specific types of alleged wrongful conduct:

1. Counts 1-4: stealing signed authorization cards from NAGE and using them to organize AMR employees for the Boilermakers[(6)]

2. Counts 5-7: contacting members of NAGE[(7)] to entice them into leaving NAGE and joining the Boilermakers, thereby changing their Section 9(a) representative.

On April 16, the Superior Court granted a preliminary injunction, which ordered that Michael Rupert, Clarence Rupert and Vincent Pernisco and "their agents, servants, employees, representative, and all persons acting in concert or participating with them" be enjoined "from engaging in, committing or performing, directly or indirectly, any and all of the following acts:"

1. From using the [NAGE] Authorization cards by [sic] in competitive efforts against [NAGE];

2. From any contacts which would or could be traced, either directly or indirectly, to [NAGE's authorization] cards including, but not limited to...contacts with the individuals whose names were on [NAGE's] cards, or co-employees of the same in Denver, or other EMTs and/or paramedics in the Boulder or Colorado Springs areas who are also employed by [AMR];

5. From any attempted or actual contacts, solicitations, or representations, of any member, locals, or officers of the same, who were dues paying members of [NAGE] for two years prior to any of the defendants' termination from [NAGE's] employ, whether such contact is made directly or indirectly or by his/her/their agent(s), employee(s)...and anyone acting in concert or participating with him/her/them[(8)]

About a week before the June 19 NLRB election, NAGE sent a flier to AMR employees which stated in part:

PEP representatives -- Mike Rupert, Bob Rupert, and Vince Pernisco -- are prohibited by the courts from any activities related to organizing you and your fellow employees at AMR, Colorado. The court injunction will likely remain in affect [sic] until the resolution of a lawsuit some four (4) years down the road.

This flier did not note that the injunction ran against "agents, servants, employees, and representatives, and all persons acting in concert or participating with" the Ruperts and Pernisco; nor did the flier refer to either PEP or the Boilermakers.

The Board election was held on June 19. The results were: Boilermakers, 79 votes; no union, 54 votes; and NAGE, 1 vote. The Region overruled objections and certified the Boilermakers in July. NAGE appealed the Regional Director's decision; its

appeal was denied on December 2.

NAGE amended the lawsuit on August 30, more than a month after the Boilermakers had been certified as the Section 9(a) representative of the AMR employees. This amendment added as defendants a former NAGE secretary (Carmen Gonzales) and the Boilermakers. However, the outstanding preliminary injunction was not amended to include these new defendants.

Also on August 30, the Ruperts and Pernisco filed the instant Section 8(b)(1)(A) charge, which alleges that since March 19 (the day after the lawsuit was filed), NAGE has maintained a frivolous state court lawsuit against the Charging Parties in order to restrain or coerce the employees of another employer (AMR) in the exercise of their Section 7 rights. The Charging Parties state that the charge attacks only the first four counts in the court complaint.[(9)]

The Charging Parties do not attack the last three counts, which deal with Michael Rupert's alleged attempts to convince NAGE members to become PEP members, allegedly in violation of the convenant not to compete in his employment agreement with NAGE.

On September 12, the court vacated paragraphs 1 and 2 of the preliminary injunction but left paragraph 5 in effect.[(10)] Thereafter, the Charging Parties withdrew their request for Section 10(j) injunctive relief against the state court injunction.

On December 9, NAGE asked the court to dismiss its entire request for permanent injunctive relief, as well as the still outstanding portion of the preliminary injunction, having apparently concluded that it had no chance of obtaining the permanent injunction after the Boilermakers had been certified by the Board as the representative of the AMR employees. Thus, the outstanding lawsuit against the two Ruperts, Pernisco, Gonzales and the Boilermakers now seeks only damages, not injunctive relief.

ACTION

We conclude that the charge should be dismissed, absent withdrawal.

The Supreme Court held in Bill Johnson's that the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only if the lawsuit lacks a reasonable basis in fact or law and was commenced with a retaliatory motive.[(11)] The Court specified that this analysis does not apply, however, if a lawsuit is preempted by federal law or was filed with an objective that is illegal under federal law.[(12)] Under San Diego Bldg. Trades Council v. Garmon,[(13)] a lawsuit is preempted when the activities at issue in the suit are "arguably subject" to the protections in Section 7 or "arguably prohibited" by Section 8. In such circumstances, the court "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[(14)] However, the Court noted that there is no preemption where the activity challenged in another forum either is of merely peripheral concern to the National Labor Relations Act or touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act."[(15)]

We first consider whether the causes of action asserted by NAGE in its lawsuit are preempted by the Act. Under Loehmann's Plaza,[(16)] where activity is arguably subject to the Act, preemption does not occur until the General Counsel issues complaint. After complaint issues, "if a preempted state court lawsuit is aimed at enjoining ... Section 7 activity, it is clear that ... the lawsuit is unlawful under Section 8(a)(1)."[(17)] However, the Board further noted that conduct under attack by a lawsuit is not "arguably" protected until the General Counsel issues complaint. Consequently, the legality of the lawsuit for the time that the action is maintained prior to the issuance of complaint is evaluated under Bill Johnson's standards.[(18)]

Initially, we conclude that NAGE's lawsuit and the ensuing injunction are not preempted by the Act. The court order essentially bars the Charging Parties from using, in furtherance of their organizing activities on behalf of the Boilermakers, authorization cards that they obtained when they were NAGE employees and allegedly kept when they became PEP employees. The court thus implicitly found, in agreement with the claim in the NAGE complaint, that the Charging Parties improperly possessed these authorization cards.

In enjoining such activity, the lawsuit and the injunction do not seek to interfere with protected or prohibited activity. It cannot be said that a union's ability to use authorization cards stolen from another union to compete with that union is an objective that deserves the protection of Section 7 of the Act. Nor is such activity prohibited by the Act. Instead, the activity is unprotected.[(19)] Thus, NAGE's suit to enjoin such activity and paragraph 1 of the court order were not preempted by the Act. Furthermore, in seeking to bar the Charging Parties from using the stolen authorization cards, the suit clearly does not have an illegal objective.[(20)]

For the same reasons, it cannot be said that the lawsuit and paragraph 2 of the court order are preempted or seek an illegal objective because they bar the Charging Parties from using the stolen cards to contact or attempt to contact AMR employees.[(21)] If, as we conclude above, direct use of the stolen NAGE cards is unprotected, it follows that indirect use of those cards to contact AMR employees is also unprotected and therefore not preempted.

We similarly reject the Charging Parties' argument that the lawsuit and injunction are preempted because, by barring the Charging Parties from using the NAGE cards to contact the AMR employees, they interfere with the asserted rights of the AMR employees to have the Charging Parties act as their collective bargaining representatives. The AMR employees have the right to be represented by the Boilermakers, their certified representative; they have no subsidiary or derivative right under the Act to be represented by specific or identified employees or agents of the Boilermakers, such as the Charging Parties. Thus, the lawsuit and injunction running against the Charging Parties do not interfere with any Section 7 rights of AMR employees.

In reaching this conclusion, we find distinguishable Brown v. Hotel and Restaurant Employees Union Local 54[(22)] and Hill v. Watson, State of Florida.[(23)] In both of those cases, the question was the right of a state to interfere in the internal decisions, including the selection of agents and representatives, of unions. Neither of those cases addressed the question of whether employees represented by a union have the right to choose specific representatives, not merely the specific union, as their representative. As to that question, Board law leads to the conclusion that no such Section 7 right exists. Thus, employees do not have the right to be represented by the Weingarten[(24)] representative of their choice when that representative is unavailable but another representative is available.[(25)] Nor do employees have the right to be represented by a union representative who engages in impermissible conduct that impedes collective-bargaining negotiations[(26)] or engages in other activity directed at the employer which otherwise so damages the union-employer relationship as to make good-faith bargaining impossible.[(27)]

That portion of the injunction that arguably bars the Boilermakers Union, as "persons acting in concert or participating with" the Charging Parties, from contacting, directly or indirectly, AMR employees where those contacts are attributable to the stolen NAGE authorization cards is also not unlawful. Since stealing authorization cards is not protected activity, using those cards, even for organizing, which is activity usually protected by Section 7,[(28)] is also unprotected in these circumstances. Consequently, that portion of the injunction is not preempted.

We recognize that the Boilermakers were certified by the Board as the Section 9(a) representative of the AMR employees after the preliminary injunction issued. However, the injunction NAGE sought and obtained did not unlawfully interfere with the Section 7 right of the AMR employees to be represented by the union of their choice because, after the Boilermakers were certified as the collective-bargaining representative of the AMR employees, NAGE asked the court to vacate that portion of the injunction that arguably sought to restrain the Boilermakers, as well as the Charging Parties, from dealing with the AMR employees. Thus, the NAGE lawsuit does not unlawfully seek to interfere with a prior Board determination of representational rights.[(29)]

Furthermore, there is no violation under the main theory set forth in Bill Johnson's. The portions of the NAGE lawsuit seeking to bar use of the NAGE authorization cards and activities or contacts based upon those cards clearly had a reasonable basis, as demonstrated by the court's granting of a preliminary injunction. Thus, the fact that the lawsuit may have been brought in retaliation for the Charging Parties' activity does not make the lawsuit unlawful under Bill Johnson's.

Finally, we conclude that complaint is not warranted as to the still outstanding that portion of NAGE's lawsuit that seeks damages from the Charging Parties, Gonzales and the Boilermakers. The motion for damages appears to be based upon

NAGE's claim that it suffered business injury because the Charging Parties stole the AMR authorization cards and then used them on behalf of the Boilermakers' successful organizing campaign, thus depriving NAGE of dues and other benefits it would obtain from AMR employees who might have chosen to be represented by NAGE. As noted above, theft of authorization cards is not activity protected by Section 7. Therefore, NAGE's suit for lost dues, allegedly a consequence of PEP's use of stolen NAGE authorization cards, does not seek to interfere with preempted activity. Furthermore, the suit does not have an illegal objective because the relief sought for such alleged theft and business injury does not interfere with the Boilermakers' statutory right to represent the AMR employees.[(30)] Finally, we cannot now say that this allegation lacks a reasonable basis, given the court's apparent conclusion that the Charging Parties misappropriated the NAGE authorization cards and improperly used them to facilitate the Boilermakers' organizing campaign, to the detriment of the NAGE organizing campaign.

For all of the above reasons, the charge should be dismissed, absent withdrawal.

B.J.K.

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[1] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 113 LRRM 2647 (1983).

[2] All subsequent events occurred in 1996.

[3] The Charging Parties have presented non-Board declarations provided by three AMR employees who claim that they called Pernisco in January and asked him to return their signed authorization cards. One of these three employees also claims that Rupert promised to return the cards on demand. One declarant also said that, about a week before the June 19 NLRB election described below, he spoke to Jennings who claimed that NAGE had no AMR authorization cards because they had been stolen. The declarant said that all of the employees had requested that their cards be returned and that the cards had been returned. The declarant further stated that Jennings did not respond to this comment.

[4] "Procedures for Determining Organizing Responsibilities."

[5] Clarence Rupert, Michael's father, and Pernisco, Michael's brother-in-law, had been NAGE National Representatives until the events described above.

[6] The lawsuit specifically alleges that Pernisco stole the AMR authorization cards and gave them to Michael Rupert.

[7] The NAGE members Michael Rupert allegedly solicited were not AMR employees.

[8] The injunction contained only three paragraphs, which were numbered 1, 2 and 5.

[9] See pp. 4-5, above.

[10] It is not clear whether the court vacated part of the injunction because it concluded that counts 1 and 2 of the injunction had become moot because the Boilermakers had won the NLRB election or because it concluded that those counts were preempted by the Act.

[11] 461 U.S. at 743-44.

[12] Id. at 737 n.5.

[13] 359 U.S. 236, 244-45 (1959).

[14] Id. at 245.

[15] Id. at 243-44 (footnote omitted).

[16] 305 NLRB 663 (1991).

[17] Id. at 671.

[18] Id. at 670.

[19] See Pennsylvania Nurses Association v. Pennsylvania State Education Association, 90 F.3d 797, 802 (3d Cir. 1996); Roadway Express, 271 NLRB 1238 (1984) (misappropriation of confidential information by employees was not protected activity).

[20] Compare cases cited in Bill Johnson's, 461 U.S. at 737 n. 5.

[21] As noted above, the unfair labor practice charge does not attack the legality, under the Act, of that portion of the lawsuit that claims that Michael Rupert improperly tried to convince NAGE members to switch to PEP/IBB. Thus, we do not have to determine the merits of that portion of the NAGE lawsuit or paragraph 5 of the injunction.

[22] 468 U.S. 491, ll6 LRRM 2921 (1984).

[23] 325 U.S. 538, 16 LRRM 734 (1945).

[24] NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

[25] See, e.g., Roadway Express, Inc., 246 NLRB 1127 (1979); Coca-Cola Bottling Co. of Los Angeles, 227 NLRB 1276 (1977).

[26] See, e.g., Fitzsimmons Mfg. Co., 251 NLRB 375 (1980) (union representative physically threatened employer representative).

[27] See, e.g., Sahara Datsun, 278 NLRB 1044 (1986)(union representative told bank that employer was submitting falsified credit applications and used union newsletter to accuse employer of involvement in prostitution and use and sale of cocaine).

[28] See 52nd Street Hotel Associates d/b/a Novotel New York, 321 NLRB No. 93, slip op. at 9-10 (July 8, 1996).

[29] See, e.g., Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133 (1995) (union lawsuit seeking damages equal to dues union would have collected not unlawful where suit was based on contract claim against employer and did not illegally seek to impose union-security obligation on bargaining unit in which, the Board had determined, union did not have majority status). Cf. Teamsters Local 776 (Rite Aid), 305 NLRB 832 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied __U.S.__, 142 LRRM 2648 (1993) (union Section 301 lawsuit seeking arbitration of representational claim, after Board had rejected that claim in a unit clarification proceeding, violated Section 8(b)(1)(A), (2) and (3) because it had an illegal objective).

[30] See, e.g., Stroehmann Bakeries, supra at 139.